Accent Maintenance Corp. *and* Service Employees International Union, Local 32E, AFL–CIO. Case 2–CA–23930

May 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On January 8, 1991, Administrative Law Judge Raymond P. Green issued the attached decision.[1] The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Accent Maintenance Corp., White Plains, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) Discharging employees in order to discourage membership in or activities on behalf of Service Employees International Union, Local 32E, AFL–CIO.''

2. Substitute the following for paragraph 2(a).

''(a) Offer immediate and full reinstatement to the employees named below to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

William Arroyave	Christian Lopez
Alfonso Celis	Miguel Rodriguez
Cynthia Cortez	Beatriz Pescador
Jose Flores	John Truyol
Patricio Levia	Roberta Uriosteque
Pablo Marino	Gladys Villanueva
Paola Mena	Augustin Zepeda
Claudio Quijada	Carlos Orellana
Maria Nunez	Christian Leiva
Jose Mejias	

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to report our employees to the immigration service, in order to induce them to refrain from union activities.

WE WILL NOT promise to rehire employees if they withdraw from the Union.

WE WILL NOT discharge our employees in order to discourage membership in or activities on behalf of Service Employees International Union, Local 32E, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to the employees named below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them,

[1] On January 25, 1991, the judge issued an erratum.

[2] The General Counsel has excepted to the judge's omission of Jose Mejias from the group of employees who were discriminatorily discharged by the Respondent on October 30, 1989. Mejias was included in an amendment to the complaint listing the names of the employees whom the General Counsel alleged were discriminatorily discharged. The evidence shows that, like the 18 employees whom the judge named in his recommended Order, Mejias signed a union authorization card on October 26; his last day of work was October 27; he was terminated on October 30; and his timecard shows a capital ''T'' after his last day of work. Supervisor Orestes Paiva indicated that the October 30 discharges occurred because those employees had signed authorization cards. The Respondent has provided no evidence that Mejias was not unlawfully discharged on October 30, 1989. We agree with the General Counsel that the judge's omission of Mejias was inadvertent, and we shall include him among those employees who were discharged in violation of Sec. 8(a)(3).

We shall also modify par. 1(c) of the judge's recommended Order to correct an inadvertent error.

in the manner set forth in the remedy section of the decision.

William Arroyave	Christian Lopez
Alfonso Celis	Miguel Rodriguez
Cynthia Cortez	Beatriz Pescador
Jose Flores	John Truyol
Patricio Levia	Roberta Uriosteque
Pablo Marino	Gladys Villanueva
Paola Mena	Augustin Zepeda
Claudio Quijada	Carlos Orellana
Maria Nunez	Christian Leiva
Jose Mejias	

WE WILL remove from our files any reference to the unlawful discharges of the persons named above and notify them in writing that this has been done and that the discharges will not be used against them in any way.

ACCENT MAINTENANCE CORP.

Margit Reiner, Esq., for the General Counsel.
Richard M. Greenspan, Esq. (Richard M. Greenspan P.C.) and *Stuart Weinberger, Esq.*, for the Respondent.
Scott P. Trevella, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on various days in August and October 1990. The charge was filed on November 7, 1989, and the complaint was issued on January 24, 1990. In substance the complaint alleged:[1]

1. That in mid-October 1989 the Union commenced an organizational campaign amongst Respondent's employees employed at various buildings in White Plains, New York.

2. That on October 30, 1989, the Respondent discharged all of the employees described above.

3. That on or about November 8, 1989, the Respondent, acting through its agent, Orestes Paiva, promised certain employees reinstatement and possible promotion if they abandoned their support for the Union.

4. That on or about November 8, 1989, the Respondent by Orestes Paiva created the impression that the Employer was engaged in surveillance of its employees' union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is engaged in the business of providing cleaning services on a contract basis for commercial customers in Westchester, New York, and Connecticut. The events described herein all occurred at a group of adjacent office buildings all owned by Schulman Realty Group and located off the Cross Westchester Expressway in White Plains, New York.

The Union was initially contacted by employee Claudio Quijada whose brother Jose was one of the supervisors. On October 26 and 27, 1989, Union Agent Reinaldo Roman met with many of the employees in the parking lot and talked to them about the benefits of joining. Many of the Company's employees signed union cards on those dates.

In late October 1989, Orestes Paiva was one of the Company's managers. He testified that on October 29, 1989, he received a call from another manager, Aramis Cordal, who said that the owner (Edith Messer) knew that the employees were signing up with the Union. Paiva testified that Cordal asked if there was any way to replace all these people; stating that the Company needed about 20 new people by Monday. According to Paiva, he then began contacting people he knew to find replacements.[2]

Paiva testified that early on the morning of October 30 (Monday) he spoke to Cordal and told him that he had obtained 14 people whom he would bring to the buildings by company van. He states that he and Cordal, given the number of replacements that had been obtained, decided to discharge most, but not all, of the current employees. Thus, Paiva testified that the employees at 2 and 4 Corporate Park and those at 3 and 4 Gannett were discharged. He states that the employees at 2 Gannett were not discharged, but only because he was short of personnel for that building.

Paiva also testified that although he did not discharge Carlos Orellana with the other employees on October 30, he did not do so because Orellana was a foreman and he didn't have enough substitutes to fill all the jobs. Paiva states that when he learned that Orellana had signed a union card, he discharged him in December.

On or about November 2 or 3, 1989, Claudio Quijada went to pick up his check and spoke with Paiva at the jobsite. Both agree and I conclude that Paiva said that the em-

[1] After the hearing closed, I issued an order denying certain amendments that were proposed by the General Counsel during the course of the hearing. It was my opinion that these amendments were not closely related to the allegations of the unfair labor practice charge and were therefore precluded by Sec. 10(b) of the Act. A copy of my Order is attached hereto as Appendix A. I also denied a subsequent motion to reopen the record and to consolidate a new complaint with the instant case. A copy of that order is attached hereto as Appendix B.

[2] About a week before Paiva testified he was still employed by the Company and was its third highest official. To the surprise of the Respondent, he testified on behalf of the General Counsel. I found his testimony to be detailed, credible, persuasive, and totally consistent with the objective facts of the case. I reject the contention that his testimony should be disregarded because he spoke with the General Counsel prior to testifying about the events in this case including his pretrial discussions with Respondent's attorneys. The Respondent makes the argument that this conduct by the General Counsel constituted a breach of the attorney-client privilege and tainted Paiva's testimony. In this regard, I think the Respondent misconstrues the privilege which precludes only the testimony about attorney-client communications. And in that respect, I refused to permit Paiva to testify about any pretrial communications he may have had with the Company's attorneys.

ployees should withdraw from the Union in order to get their jobs back, and that if Quijada did not withdraw from the Union, he would be reported to Immigration. In my opinion the former statement promising reinstatement for withdrawing from the Union constitutes a violation of Section 8(a)(1). *A-1 Schmidlin Plumbing Co*., 284 NLRB 1506 (1987). I also conclude that Paiva violated Section 8(a)(1) by threatening to report Quijada to the immigration authorities. *Carl's Jr*., 285 NLRB 975, 987 (1987).[3]

Based on demeanor factors as well as the entire record, I shall credit the account of Orestes Paiva regarding the events described above.[4] Therefore, while I recognize that the Company produced evidence indicating the need to make managerial and supervisory changes at the affected buildings, I do not credit the Respondent's assertion that the discharges of the rank-and-file employees were necessitated or motivated by the circumstances giving rise to those changes. Instead, given the detailed and credible testimony of Paiva, it is concluded that the discharges that occurred on October 30, 1989, were motivated by antiunion considerations. Therefore based on the testimony of witnesses and other documentary evidence, I conclude that the following employees were illegally discharged on October 30, 1989.

William Arroyave	Christian Lopez
Alfonso Celis	Miguel Rodriguez
Cynthia Cortez	Beatriz Pescador
Jose Flores	John Truyol
Patricio Leiva	Roberta Uriosteque
Pablo Marino	Gladys Villanueva
Paola Mena	Augustin Zepeda
Claudio Quijada	

Based on the credited testimony of Paiva I shall also conclude that certain of the employees alleged to have been discriminatorily discharged on October 30 were not in fact discharged on that date. Thus, Paiva credibly testified that Jorge Donoso, a foreman, was discharged on Friday, October 27, 1989, for reasons totally unrelated to the Union.[5]

I also credit Paiva's testimony that Antonio Pais' discharge was unrelated to the Union and occurred on October 27 because of his unexcused absences since October 20.

Paiva credibly testified that on Friday, October 27, he told Foreman Leandro Leiva that he was going to make him a cleaner whereupon Leiva quit. As Paiva's testimony shows that this event had nothing to do with the Union, I shall dismiss the allegation that this individual was discriminatorily discharged.

In the case of Claudio Quijada, Paiva testified that on October 27 he told Quijada about a job change whereupon the latter said that he might quit on Monday. However, as Paiva received instructions to fire employees on Sunday, this resulted in his Quijada's discharge before he could indicate whether he would stay or leave. Because of the intervening discharge, it is speculative as to whether Quijada would have quit or remained on the job. I therefore reject the Respondent's assertion that Quijada quit prior to the discharges of October 30. I also reject any contention that Quijada would have been discharged because he had used a false name on his employment application.

The situation involving Christian Leiva is somewhat unique. In this case, Christian Leiva had gone to Chile and was out of the country on October 30. It appears that he arranged for another person to do his job. Therefore, it was this person (who was never hired by the Company) who was discharged on October 30, 1989. It is not known by me whether Leiva made this arrangement without or without permission.

With respect to Christian Leiva, I think that the evidence shows that Paiva intended to discharge him but unwittingly discharged an unknown person who was on the job instead. Thus, I would conclude that there was an 8(a)(3) violation in this transaction. However, for the period of time that Leiva was not present in the country, he was unavailable for work and therefore not entitled to backpay. Nor, might I add, do I think that the person who filled in for him and who was not ''employed'' should be entitled to backpay.

There is also some dispute about an employee named Maria Nunez. The only evidence regarding this employee are her employment records which indicate that she was employed at 4 Corporate Park. These records indicate that she worked the week ending October 27; that she did not work the week ending November 3; and that she resumed working the following week. Unlike most of the records for other employees which have a T after the week ending October 27 (indicating to me termination), hers does not.

Although the facts in the case of Maria Nunez may be somewhat ambiguous, I feel that the General Counsel has met her burden of proof whereas the Employer has not countered with evidence showing that she was not discharged with the others. I shall therefore conclude that she too was discriminatorily discharged on October 30.

As noted above, Paiva testified that a foreman named Carlos Orellana, who was not fired on October 30, was discharged in December 1989 when he (Paiva) found out that Orellana was involved with the Union. This raises a number of issues as follows.

The Respondent contends that an allegation regarding Orellana was not properly made and that the circumstances of his discharge were not fully litigated. At the outset of the hearing the General Counsel included Orellana's name as

[3] The Respondent contends that the allegation regarding the threat to report employees to the I.N.S., not being part of the charge, should be barred by Sec. 10(b). However, as this allegation occurred in conjunction with the events of October 30, 1990, and considered by me to be part of a single plan of action, I conclude that the allegation is ''closely related'' to the charge and is therefore not barred under *Nippondenso Mfg*., 299 NLRB 545 (1990).

[4] For reasons not relevant to this particular proceeding, Paiva volunteered to talk to the General Counsel and related the facts as he knew them. As this occurred 1 or 2 days before the resumption of the trial on October 4, 1990, the General Counsel had little time to go over his testimony before putting him on the stand. This lack of pretrial preparation manifested itself when it became obvious that the General Counsel and Paiva were not communicating with each other regarding events that occurred after the discharges at issue in this case. Seeing that the General Counsel was soliciting testimony without knowing what to expect as answers, I expressed my annoyance that she was cluttering the record with irrelevant material. I therefore told her that she should, during the lunchbreak, prepare Paiva regarding the testimony she expected to elicit from him on direct examination. As this was done prior to the commencement of cross-examination, I do not see the impropriety that is suggested by the Respondent. Nor do I see how this could possibly have prejudiced Respondent's right to cross-examine this witness. (This was not a situation where the General Counsel was allowed to talk with this witness after cross-examination had started.)

[5] On cross-examination, Donoso conceded that on October 27 he was told by the supervisor that he might be fired because he had complained about doing certain work.

one of the alleged discriminates. After obtaining records subpoenaed from the Respondent which showed that Orellana was not discharged on October 30, she withdrew his name from the 8(a)(3) allegation. However, when Paiva's evidence became available, the General Counsel learned that Paiva had discharged Orellana in December 1989 because of his union activities. She therefore moved to amend the complaint to revive the allegation concerning Orellana. Although I reserved ruling on this and a number of other motions to amend the complaint (see Appendix A), I also indicated that I would receive this testimony. Therefore, Respondent was on notice that evidence regarding this allegation was going to be received and relied upon if I felt that the motion to amend was appropriate. As this allegation relates to another discharge by Paiva, motivated by identical considerations and involving an event that is essentially a continuation of the other conduct found to be illegal, it is my opinion that the allegation involving Orellana is ''closely related'' to the charge and is not barred by Section 10(b) of the Act.

Respondent also contends that the allegation regarding Orellana should be dismissed because he was a supervisor. However, based on the credited testimony of Paiva, I conclude that the individuals who were classified as foremen were leadmen and not supervisor's within the meaning of Section 2(11) of the Act. See *Carl's Jr.*, 285 NLRB 975, 978 (1987). Thus, the credible evidence shows that foremen did not have the authority to hire or fire and that they did not, except in a routine manner, assign or direct the work of others. The contrary testimony of Ruggeri is discounted as she admittedly had very little to do with operations and therefore had no personal knowledge of how foremen related to the rank-and-file work force.

There was some testimony regarding whether or not certain of the employees discharged on October 30, 1989, were given valid offers of reinstatement.

William Arroyave, an employee who was discharged on October 30, testified that about a week later he was reinstated and was thereafter made a foreman.

The Respondent solicited testimony on cross-examination from employees Cortez and Villanueva that they were offered reinstatement.[6] In the case of Villanueva, she testified that she did not accept the offer because she was offered a job at a different location that was much further away from her home. In the case of Cortez, she testified that the job she was offered paid less than the job from which she was discharged. Finally, documentary evidence in the form of timecards for employee Mejias indicates that she returned to work but at a lower hourly rate.

Issues of backpay and reinstatement ordinarily are dealt with at the compliance stage of unfair labor practice proceedings. To the extent that the Company contends that various employees (not named above) were given valid offers of reinstatement, that should be dealt with in compliance. Also, to the extent that evidence was received regarding reinstatement offers and/or acceptances by Arroyave, Villanueva, Cortez, and Mejias, I do not believe that the issue of whether or not such offers were valid was fully litigated. It therefore is my opinion that such issues also belong in the compliance stage of this case.[7]

As there was no evidence supporting the surveillance allegation, I shall recommend that this contention be dismissed.

CONCLUSIONS OF LAW

1. By threatening to report employees to the Immigration Service, in order to induce them to refrain from union activities, the Respondent has violated Section 8(a)(1) of the Act.

2. By promising to rehire employees if they withdraw from the Union, the Respondent has violated Section 8(a)(1) of the Act.

3. By discharging the following named employees in order to discourage employees from joining or supporting Service Employees International Union, Local 32E, AFL–CIO, the Respondent has violated Section 8(a)(1) and (3) of the Act.

William Arroyave	Christian Lopez
Alfonso Celis	Miguel Rodriguez
Cynthia Cortez	Beatriz Pescador
Jose Flores	John Truyol
Patricio Leiva	Roberta Uriosteque
Pablo Marino	Gladys Villanueva
Paola Mena	Augustin Zepeda
Claudio Quijada	Carlos Orellana
Maria Nunez	Christian Leiva

4. Accept as found herein, the Respondent has not violated the Act in any other manner encompassed by the complaint.

The aforementioned violations of the Act affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Accent Maintenance Corp., White Plains, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[6] It is unknown by me whether such offers were made in writing. If they were, they were not produced or offered at this hearing.

[7] The Respondent contends that certain employees were illegal aliens and therefore should not be entitled to reinstatement or backpay. Evidence on such an issue, to the extent that it would be relevant under *Sure Tan Inc. v. NLRB*, 467 U.S. 883 (1984), and subsequently decided cases, should be left to the compliance stage of this proceeding. Any other contentions regarding the appropriateness of reinstatement for any of the employees found herein to have been unlawfully discharged should similarly be dealt with in compliance.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Threatening to report employees to the Immigration Service in order to induce them to refrain from union activities.

(b) Promising to rehire employees if they withdraw from the Union.

(c) Discharging employees in order to discourage membership in or activities on behalf of the Service Employees International Union, Local 32E, AFL–CIO, the Respondent has violated Section 8(a)(1) and (3) of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to the employees named below to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

William Arroyave	Christian Lopez
Alfonso Celis	Miguel Rodriguez
Cynthia Cortez	Beatriz Pescador
Jose Flores	John Truyol
Patricio Leiva	Roberta Uriosteque
Pablo Marino	Gladys Villanueva
Paola Mena	Augustin Zepeda
Claudio Quijada	Carlos Orellana
Maria Nunez	Christian Leiva

(b) Remove from its files any reference to the unlawful discharges of the persons named above, and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the White Plains, New York office buildings where the above-named employees worked, and at its principal office and place of business copies of the attached notice marked ''Appendix C.''[9] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

ORDER

The hearing in this matter opened on August 20, 1990, and closed on October 5, 1990.

The charge filed on November 7, 1989, alleged that the Respondent discharged employees on October 31, 1989, because of their support for the Union. Based on that charge a complaint was issued on January 24, 1990, alleging:

1. That in mid-October 1989 the Union commenced an organizational campaign amongst Respondent's employees employed at various buildings in White Plains, New York.

2. That on October 30, 1989, the Respondent discharged all of the employees described above.

3. That on or about November 8, 1989, the Respondent acting through its agent, Orestes Paiva, promised certain employees reinstatement and possible promotion if they abandoned their support for the Union.

4. That on or about November 8, 1989, the Respondent by Orestes Paiva created the impression that the Employer was engaged in surveillance of its employees' union activities.

Prior to and at the hearing, the General Counsel amended the complaint to specify the names of individuals whom she alleged were discriminatorily discharged on October 30, 1989.

At the resumption of the hearing on October 4, 1990, the General Counsel, having requested permission to reopen her case, presented Orestes Paiva as her witness. As Paiva was the second highest official of the Company, his testimony on behalf of the General Counsel came as quite a surprise to the Respondent. In support of the General Counsel's allegations, Paiva testified, inter alia, about instructions he allegedly received and implemented to replace the employees at the locations in question because they were signing union cards.

The General Counsel then proceeded to ask Paiva questions regarding his pretrial preparation by the Respondent and its attorneys; about the circumstances surrounding his quitting on or about October 1, 1990; and about the alleged discharge of his sister at about the same time. When inquiry was made as to the relevance of these questions, the General Counsel indicated that she intended to amend the complaint. Later in the day, she tendered a written motion to amend the complaint which was opposed by the Respondent. Summarizing these proposed amendments, the General Counsel contended:

1. That the Respondent instructed Paiva to give false testimony.

2. That the Respondent constructively discharged Paiva on October 1, 1990, because he refused to give false testimony regarding the underlying case.

3. That the Respondent discharged Paiva's sister, Dione Paiva, because Orestes Paiva refused to give false testimony.

4. That the Respondent threatened that it would report Dione Paiva to the Immigration Service because Orestes Paiva refused to give false testimony.

At the remainder of the hearing on October 4 and 5, 1990, I permitted the General Counsel to inquire into these matters while reserving ruling on whether to permit the complaint to be amended. The principle reason for not giving a firm ruling on this matter was my doubt as to the validity of the motion under the Board's recent decision in *Nickles Bakery of Indiana* 296 NLRB 927 (1989). In any event, the Respondent

put on some evidence to rebut aspects of Orestes Paiva's testimony, but it it did not address, through its own witnesses, substantial portions of the proposed amendments. As such, the allegations of the proposed amendments clearly have not been fully litigated.

On October 11, 1990, the Respondent's counsel renewed its objections to the proposed amendments. Counsel also proposed that in the event that I granted the motion to amend the complaint, the hearing should be reopened to allow the Respondent to litigate fully the merits of these allegations.

By letter dated October 19, 1990, the General Counsel responded to the Respondent. She set forth the Government's position that the proposed amendments were closely related to the allegations of the original charge and that the hearing should not be reopened because the merits were fully litigated.

By letter dated October 23, 1990, the General Counsel informed me that she no longer opposed the reopening of the case, ''as reopening will cure any procedural problems that may arise.'' She also notified the parties that the Region would obtain a new unfair labor practice charge covering the allegations set forth in the proposed amendments ''as well as covering new allegations of retaliatory conduct against Orestes Paiva, which have occurred after Orestes' constructive discharge and which have only recently been brought to the General Counsel's attention.''

In effect, the General Counsel seems to acknowledge that the proposed amendments may very well be outside the scope of the original charge, but that the amendments would be ''cured'' by the filing of a new charge at some point in the future.

In *Nickles Bakery of Indiana*, supra at 928–929, the Board stated:

> Having reexamined Board precedent in this area in light of the court's decision in *Galloway* and our own decision in *Redd-I*, we find no sufficient basis in law or policy for continuing to exempt 8(a)(1) complaint allegations from the requirements of the traditional ''closely related'' test. On the contrary, we believe that a uniform requirement in all 8(a) cases that a complaint allegation be factually related to the allegation in the underlying charge will end the disparity that currently exists in our case law. . . . Allowing the boilerplate ''other acts'' language to support unrelated 8(a)(1) complaint allegations contravenes 10(b)'s mandate that the Board ''not originate complaints on its own initiative.'' In addition, such an approach virtually renders meaningless the specificity required by Section 102.12(d) of the Board's Rules and Regulations that a charge contain a ''clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.''
>
> Finally, we recognize that matters raising unfair labor practice issues often are discovered or occur after the original charge is filed. In those circumstances, it is customary for a charging party to file an amended charge or an entirely new charge. Obviously, nothing in our decision today limits in any way a charging party's ability to file a timely new or amended charge. Therefore, our holding will impose no significant hardship on a charging party, who continues to remain free to raise additional timely allegations for Board consideration. [Citations omitted.]

Most recently, in *Nippondenso Mfg.*, 299 NLRB 545 (1990), the Board held that a charge alleging that the employer violated Section 8(a)(1) by interfering with the rights of employees to distribute union literature and wear union buttons was not sufficient to sustain a complaint allegation that the employer violated Section 8(a)(3) by discharging an employee. In refusing to find that the discharge allegation was closely related to the charge, the Board held that the allegations did not have a ''sufficient factual or legal nexus'' linking the charge and complaint even though the discharge arose in the context of the same organizing campaign.

Pursuant to the above-cited cases, it is my opinion that the proposed amendments raise issues which are factually and legally distinct from the allegations of the charge. It is clear to me that these new allegations, which occurred almost 1 year after the events alleged as unlawful in the initial charge, set forth factual and legal transactions requiring substantially different and distinct modes of defense. As such, it seems to me that the Respondent has not been given sufficient notice regarding these allegations and has not been given the opportunity to participate (or not participate) in an investigation of these matters upon the filing of a timely unfair labor practice charge.

While I can fully appreciate why the General Counsel chose to go forward as she did, given the sudden appearance of a management official willing to give important testimony for the Government, it seems to me that these new allegations are sufficiently distinct from the original charge so that the proposed amendments would amount to the origination of a complaint on the Board's own initiative. Indeed, I think that the General Counsel virtually concedes this to be the case as she now indicates that a new charge covering these allegations is being solicited.

By denying the General Counsel's motion to amend the complaint, this would not preclude her from issuing a new complaint if a new charge is in fact filed, investigated, and found to warrant further proceedings. In this regard, I note that the events alleged to be unlawful took place well within the 6-month statute of limitations. Moreover, if a new complaint is issued, this Order would not preclude a motion to consolidate cases coupled with a motion to reopen the present record. Such a motion, if filed, would be considered by me on its own merits and might or might not be granted depending on all the circumstances then extant.

APPENDIX B

ORDER

On November 21, 1990, the General Counsel made a motion to consolidate Case 2–CA–24733 with Case 2–CA–23930. This motion is denied for the following reasons:

The hearing in Case 2–CA–23930 opened on August 20, 1990, and closed on October 5, 1990. That case involved the alleged unlawful discharge of numerous employees.

The complaint in Case 2–CA–24733 alleges that the Employer instructed a managerial employee, Orestes Paiva, to testify falsely in the above-described hearing and that it retaliated against him and his sister because he refused to do so. While related to the prior case, the events of the com-

plaint are also distinct and involve separate issues of law and fact.

Section 10(m) of the Act states that charges under Sections 8(a)(3) and 8(b)(2) are to be given priority over all other cases except those of like character or charges given priority pursuant to Section 10(l) of the Act. As the record in Case 2–CA–23930 is ripe for decision, it seems to me that the Employer, the Union, and the employees are entitled to have their respective rights and obligations determined with reasonable dispatch. It is my opinion that a reopening of the record would not be necessary to determine the outcome of the new complaint and would only cause substantial and unnecessary delay in deciding the initial case.

Insofar as the parties requested an extension of time to file briefs in Case 2–CA–23930, I shall set the time for filing as December 15, 1990. No further extensions will be considered except for extraordinary circumstances.